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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1008

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–34) is reported at 367 F. 2d 171. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–2, 3–36) [1] are reported at 152 NLRB 1447.

JURISDICTION

The decree of the court of appeals (Pet. 35–36) was entered on November 3, 1966. The petition for a writ of certiorari was filed on January 27, 1967.

[1] "R." refers to the record in the court below.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The union, which had a primary dispute with the owner of certain barges, picketed those barges at locations where the owner's employees performed no work and the barges were being operated or serviced by neutral employers. The question presented is whether, in the circumstances of this case, the Board properly concluded that the union's picketing at those locations was secondary and thus violated Section 8(b)(4)(B) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 20 of the petition.

STATEMENT

1. *The operations of Mid-America Transportation Company.*—Mid-America Transportation Company ("MAT") transports commodities by barge on the Mississippi River, primarily between East St. Louis, Illinois and St. Paul, Minnesota; it hauls coal upstream and grain on the trip back (R. 4–5, 7). MAT owns the towboats used for these trips, the chief one being the *Eleanor Gordon;* it either owns or charters the barges (R. 7; 52–53).

The *Eleanor Gordon* has an operating crew of about 13 employees, whose quarters are located on the towboat (R. 9; 59). The crew releases and secures, at MAT's docks in East St. Louis, the barges that the

Eleanor Gordon has brought downstream, and then prepares the barges loaded with coal for towing up to St. Paul, Minnesota, (R. 8; 53–56). While on the journey up the river, deckhands normally spend about half of their time on the towboat and half on the barges (R. 8–9; 61–62). The barges are towed to a "fleeting area" or "parking lot" near St. Paul, where they are released (R. 7, 9; 58, 60, 61–62). Thereafter, the *Eleanor Gordon* picks up its southbound tow and returns to St. Louis (R. 7, 9; 58). No employees of MAT remain with the barges after they are released at the fleeting area (R. 9; 73, 75–76, 86–87, 89–91).

Twin City Barge & Towing Company ("Twin City") provides towing and harbor services in the St. Paul area for the major barge companies (R. 9; 91–92, 137–138, 142).[2] Twin City has done business with MAT for about six years (R. 10; 97). It transports the MAT coal-laden barges from the fleeting area to the dock of the Northern States Power Company, the ultimate purchaser of the coal. After the barges have been emptied and cleaned, Twin City moves them to the dock of the Farmers' Union Grain Terminal ("Farmers"), where they are loaded with grain, and then back to the fleeting area (R. 9–10, 12–15; 92, 95). No MAT employees accompany Twin City when it moves the barges beyond the fleeting area, and MAT does not supervise the Twin City employees in any way (R. 11; 94–95).

[2] The City of St. Paul owns the fleeting area, which it leases to Twin City for the use of the latter's barge customers (R. 10; 93–94).

2. *The picketing.*—On August 1, 1964, petitioner National Maritime Union of America, which represents the unlicensed maritime employees of MAT, called a strike against that Company over contract terms (R. 7; 126). That morning Union Agent Collileux came to Farmers' dock in St. Paul and asked Farmers' barge-loading employees who were at work there to support the strike against MAT and respect the picket lines. Collileux was referred to an official of the union that represented Farmers' employees, who agreed to respect the picket line (R. 15–16; 77–78, 73).

Later that day, when two MAT barges were present at Farmers' dock,[3] Collileux began picketing on public property near those barges. His sign stated that the union was on strike against MAT and had no dispute with any other employer (R. 17; 70, 71–72, 76–77, 81). Collileux picketed until the Farmers' employees left for the day; no MAT barges were loaded during the picketing (R. 17; 72–73, 76). On August 5, he returned to the dock while Farmers' employees were loading a MAT barge. When Collileux began to picket again, Farmers' employees stopped loading (R. 17–18; 74–75, 80). Neither the employees of MAT nor any of its towboats were present during these two instances of picketing (R. 16, 18; 73, 79).

On August 11, a Twin City boat was about to pick up two MAT barges at the property of a St. Paul firm that services barges. One of the Twin City deckhands saw a picket on the shore with a sign iden-

[3] The barges had been brought there by the towboat *Tom Thumb*, operated by the Pilot Towing Company (R. 18; 110).

tical to that previously carried by Collileux, and advised his captain that the barges could not be handled[4] (R. 5, 11, 19–20; 84–86, 106–107). On August 20, the same boat went to the dock of another grain company to pick up a MAT barge loaded with grain. A deckhand again saw a picket on the shore and told the captain "they did not want to pick up the barge" (R. 20; 86–87). Five days later, while another Twin City boat was transporting MAT barges from the fleeting area to the Northern States Power Company plant, it was met by a small craft with a picket (Collileux) aboard. Collileux asked the captain to untie the barges, which he did (R. 20–21; 87–89). During all of these incidents, there were no employees of MAT or any of its towboats in the area (R. 20–21; 86–87, 89–90).

3. *The Board and court decisions.*—The Board found that the union's primary dispute was with MAT; that the situs of that dispute was the MAT towboats and barges as they plied between East St. Louis and the fleeting area in St. Paul; and that neither the MAT towboats nor any MAT employees worked in the St. Paul harbor outside the fleeting area (R. 29). Accordingly, the Board concluded that the union's picketing and related conduct outside that area was not legitimate primary activity, but secondary activity barred by Section 8(b)(4)(B) of the Act (R. 29–34). The Board ordered the union and its agents to cease and desist from the unfair labor practices found (R. 34–36).

[4] Twin City's deck employees are also members of petitioner union (R. 11, 20).

The court of appeals sustained the Board's findings and enforced its order (Pet. 21–34).

ARGUMENT

The decision of the court of appeals turns on its special facts, constitutes a correct application of the relevant legal principles, and is not in conflict with other decisions. There is no occasion for further review.

1. Section 8(b)(4)(B) of the Act (Pet. 20) bars a union from engaging in secondary strikes or picketing, but preserves the right to engage in primary activity. In general, union activity is primary when it occurs at the situs of the main dispute, which usually is the primary employer's own premises, and seeks no more than to disrupt the normal operation of his business.[5] But when the activity is extended beyond the situs of the primary dispute to the premises of a neutral employer, it is ordinarily secondary.[6]

Applying these principles here, the Board and the court below correctly concluded that the union's picketing and related activity at locations above the fleeting area was secondary. Thus, as the court noted (Pet. 32–33), "MAT's towboat did no towing above the fleeting area and * * * MAT's crew left the

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[5] See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665; *Local 761, Electrical Workers* v. *National Labor Relations Board* (*General Electric Corp.*), 366 U.S. 667; *Steelworkers* v. *National Labor Relations Board* (*Carrier Corp.*), 376 U.S. 492.

[6] See *National Labor Relations Board* v. *Carpenters* (*Wadsworth Bldg. Co.*), 184 F. 2d 60 (C.A. 10), *certiorari denied*, 341 U.S. 947; *National Labor Relations Board* v. *United Hatters*, 286 F. 2d 950 (C.A. 4).

barges there and performed no service of any kind upriver." Accordingly, when the union picketed the MAT barges above the fleeting area and while they were being used by the neutral employers (Twin City, Harbor, and Farmers), it extended its economic pressure beyond the situs of the primary dispute to "the normal jobsites of secondary employees alone * * * and affected their normal work at such normal sites without the accompaniment or even proximateness of primary status" (Pet. 33). Such an expansion of the labor dispute is secondary and barred by Section 8(b)(4)(B). See *National Labor Relations Board* v. *Highway Truckdrivers, Local 107*, 300 F. 2d 317 (C.A. 3).

2. Petitioners contend (Pet. 8–15) that transporting the barges beyond the fleeting area and loading and cleaning them—all work performed by neutral employers—was essential to the normal operation of MAT's business; and that under this Court's decisions in *General Electric* and *Carrier* (cited, n. 5, *supra*), the union was entitled to picket the performance of such tasks. Although the Court in those cases held that picketing which sought to disrupt only the day-to-day operations of the struck employer was primary, the picketing there occurred at, or immediately adjacent to, the primary employer's plant, which was the situs of the primary dispute.[7] As the Court explained

[7] In *General Electric*, the picketing occurred at a gate to the primary employer's plant which had been reserved exclusively for independent contractors and their employees. In *Carrier*, it occurred at a railroad gate which "adjoined company property and was in fact the railroad entrance gate to the Carrier plant" (376 U.S. at 500).

in *Carrier* (376 U.S. at 499), Congress did not intend to prohibit picketing at the situs of the primary dispute that was intended to reach "employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations," since picketing during a strike "has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt."

But the Court did not hold, as petitioners suggest, that an appeal to a neutral employee to refrain from performing work or services which would aid the operations of the primary employer is permissible where that appeal is made at a location that is not the situs of the primary dispute and at which the employees of the primary employer do not work.[8] Here the Board ruled that the situs of the primary dispute was the MAT tugboats and barges as they operated on the river between East St. Louis and the fleeting area in St. Paul; the union picketing took place, however, at points in St. Paul that were beyond the fleeting area and at which no MAT employees worked on the barges (*supra,* pp. 3–5). Thus, the picketing was not

[8] Indeed, in *Carrier* the Court pointed out that, although the location of the picketing is not decisive, it is nevertheless an "important" factor (376 U.S. at 499). And, in finding that the picketing at the railroad gate was primary, the Court emphasized that (*id.*, at 500, italics added): "For the purposes of § 8 (b) (4) picketing at a situs *so proximate* and related to the employer's day-to-day operations is no more illegal than if it had occurred at a gate owned by Carrier." Cf. the court of appeals' example in the present case of picketing the mine or refinery of MAT's fuel suppliers (Pet. 31–32).

at the situs of the primary dispute, and it was therefore secondary, not primary.

Nor is the decision below in conflict with *Seafarers Union* v. *National Labor Relations Board*, 265 F. 2d 585 (C.A.D.C.), as petitioners contend (Pet. 15–18). That case, in which the court stated (p. 590) that it was not "mak[ing] a ruling broader than the case before us," held only that picketing of a ship in a repair yard, that was primary in its inception because employees of the primary employer remained on board, did not become secondary when the employer temporarily removed those employees from the ship. The rationale of the decision was that an employer cannot "transform a picket line from a legal one to an illegal one merely by moving his non-supervisory employees away" (*ibid.*). See *General Electric, supra* (366 U.S. at 680), where the Court stated: "Of course an employer may not, by removing all his employees from the situs of the strike, bar the union from publicizing its cause * * *." The present case, however, as the court below pointed out (Pet. 33), "is not a situation of the primary employees' mere absence from their jobsite;" instead, "the barges had ceased to be the jobsite before [the Union's] picketing took place."[9]

[9] *National Labor Relations Board* v. *Fruit & Vegetable Packers*, 377 U.S. 58, also relied on by petitioners (Pet. 11–12), is wholly inapposite. There, the union, in furtherance of its dispute with apple growers, picketed the retail stores handling those products with signs appealing to consumers not to buy them. The picketing clearly had the secondary object proscribed by Section 8(b)(4)(B); the only question was whether Congress had proscribed the means utilized, *i.e.*, peace-

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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ful picketing urging consumers not to buy the disfavored product. The present case, on the other hand, involves picketing addressed not to consumers, but to neutral employees. There is no question that Congress interdicted such picketing where, as here, it is carried on for a secondary object, irrespective of whether it is limited to the primary employer's "product," or calls for a more widespread disruption of the neutral's business.

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